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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

NICK MILETAK, Plaintiff and Appellant, v. ROYAL COACH TOURS, Defendant and Respondent.	H043999 (Santa Clara County Super. Ct. No. 2015-1-CV-279978)

Plaintiff and appellant Nick Miletak appeals from a judgment after a court trial in an action against his former employer, respondent Royal Coach Tours (Royal Coach), for unpaid wages based on claims of promissory estoppel and constructive termination. After Miletak presented his evidence and rested, the court granted Royal Coach's motion for judgment (Code Civ. Proc., § 631.8[1]) and entered judgment for Royal Coach.

Miletak raises four issues on appeal. First, he contends that the trial judge erred when the judge disclosed that Royal Coach's counsel had represented his sister in an unrelated matter, "but failed to recuse himself as required by law." Second, he asserts that the trial court failed to hold both litigants to the same standard "in enforcing procedural compliance." In particular, he complains that the court sanctioned him $500 for failing to answer form interrogatories, but denied his motion in limine requesting evidentiary and monetary sanctions against Royal Coach for allegedly failing to timely serve its trial brief and trial papers as required by local rule. Third, he contends that the

[1] All undesignated statutory citations are to the Code of Civil Procedure.

trial court erred when it denied his request for a continuance to subpoena trial witnesses after the trial had started. Fourth, he argues that the trial court was "too passive" and should have asked clarifying questions and suggested the production of evidence to ensure that Miletak established all of the elements of his promissory estoppel claim. Miletak asks this court to reverse the judgment and remand the case for a new trial. We find no error and will affirm the judgment.

I. FACTS[2]

Royal Coach is a family-owned business that provides charter bus services in the San Francisco Bay Area, including transport services for employees of Apple and Google. In early 2015, Royal Coach posted two ads for two separate job openings on the employment website Indeed. The first ad was for licensed, commercial bus drivers and offered an annual salary of $50,000. The commercial bus driver position required the employee to possess a commercial class B driver's license with a P2 passenger endorsement (hereafter commercial driver's license). The second ad stated, "Get paid while you train for your commercial driver's license" and explained that Royal Coach would pay students enrolled in its training program while they trained to obtain a commercial driver's license.

Miletak was unemployed when these ads appeared on Indeed. He saw the ad for licensed commercial drivers, but claims he did not see the ad for student driver trainees.

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[2] Miletak was the only witness at trial and the statement of facts is based on his trial testimony. The record on appeal does not include copies of either party's trial brief or the trial exhibits. Neither party arranged for the trial exhibits to be transmitted to this court (Cal. Rules of Court, rule 8.224; all further rules citations are to the Rules of Court). Generally, "[w]here exhibits are missing we will not presume they would undermine the judgment." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.) While a review of the exhibits may have answered questions we have about the underlying facts, a review of the exhibits is not necessary to resolve the issues presented in this appeal. We therefore have not directed the parties to transmit the exhibits to this court. (Rule 8.224(d).)

Miletak knew it cost $3,000 to $4,000 for formal instruction to obtain a commercial driver's license because he had looked into other programs that offered such training. The prospect of obtaining the training from Royal Coach at no cost while being paid to complete the training seemed "like a good deal" to him.

Miletak applied for a job at Royal Coach and was hired. On March 5, 2015, he signed a written employment agreement to work as a student trainee in its commercial driver's license course. (Unless otherwise stated, all date references are to 2015.) The agreement confirmed that Royal Coach had offered Miletak " 'temporary employment . . . for the positon of student' " and stated, " '[y]ou will receive an hourly wage of $10.30 per hour for the duration of the course . . . . You are expected and required to work all hours for which you are scheduled.' " The agreement also stated, " 'Following successful completion of the course, receipt of a commercial driver's license, and satisfaction of other criteria, Royal Coach Tours may offer employment to you for the position of a driver.' " Miletak testified that he read the employment agreement, understood what he was being hired for, and agreed with its terms and conditions before signing it. But he also testified that it was "not abundantly clear" to him that the position was temporary and that of a student.

On March 10, Royal Coach's human resources director Veronica Paganelli sent Miletak an e-mail describing additional things he needed to do before the training started. The training was scheduled to begin on March 16. The start date was later "delayed" until March 30 by Royal Coach because it did not have enough students in the program.

Toward the end of March, Miletak got a job with Volt, a temporary staffing agency, and was assigned to work at Fujitsu 40 hours per week from 9:00 a.m. until 5:00 or 6:00 p.m. starting March 30. Around that time, he also received the e-mail from Paganelli, stating that the driver's license course was scheduled to start on March 30. Miletak contacted Paganelli and asked if his start date could be delayed so he could give

notice and properly resign from his job at Volt. They "mutually agreed" to delay his start date to April 1. Miletak worked at Fujitsu for one day (March 30). He resigned from the job at Volt because his work schedule at Fujitsu conflicted with the training schedule at Royal Coach.

Miletak said he did not know that he could accept work elsewhere while training with Royal Coach. He denied that Royal Coach encouraged him to accept work elsewhere because the student position was temporary. When asked why he did not keep the job at Volt until he received formal notice that the classroom training was going to begin, Miletak responded that he did receive formal notice from Paganelli in an e-mail that classes were beginning on March 30. He denied that she had told him repeatedly that these were projected start dates and testified that she said the date was firm.

When Miletak reported for training on April 1, Royal Coach discovered that he did not have a commercial driver's permit, which was required for the training, and sent him to the Department of Motor Vehicles (DMV) to obtain a permit. Miletak admitted he was not qualified to begin the training on April 1 because he did not have the necessary driver's permit. On April 4, the DMV issued his commercial driver's permit.

Before the classroom instruction began, Miletak periodically went to the Royal Coach office and asked when the training was going to start. Royal Coach alleged that on those occasions, it would allow him to read employment manuals and watch instructional videotapes. For example, on April 2, Miletak received one hour of training on pre-trip inspections. On April 8, he received information on "operation safe transport" and was then told to go home because the formal classroom instruction was on hold. Royal Coach asked him to keep track of his time and Miletak admits he was fully compensated for that time.

On an undisclosed date, Miletak sent an e-mail to Paganelli asking about compensation for shuttle bus drivers. The point of that e-mail was not to ask what he

might earn if he completed the training, passed the licensing test, and was hired by Royal Coach as a commercial bus driver. Miletak said he was trying to clarify an "uncertainty" about his compensation for the trainee job since the ad said he would earn $50,000 per year, but Paganelli's e-mails contained a lower hourly rate. On April 13 or 14, Paganelli sent him an e-mail explaining that he was in a training program with Royal Coach, his rate of pay was $10.30 per hour, and his "schedule would not be a routine 40 hours a week during this time." Miletak testified that Royal Coach did not tell him this before he accepted the job and that if he had known that, he would not have taken the job. On April 18, one of the Royal Coach instructors called Miletak and told him the formal classroom instruction was going to start on April 20 at 9:00 a.m.

Miletak went to Royal Coach on April 20. Rather than start the training, he gave Royal Coach's general manager Earl Reed two letters and left. The first letter was a demand for unpaid wages, and the second was a letter of resignation. Miletak resigned "effective immediately" stating, "I cannot in good conscience work for an employer that does not honor commitments to employees." By this, he meant the company failed to pay wages, to honor its commitment to give him a schedule, and to provide the number of hours he expected to work. Miletak did not participate in the classroom instruction that started that day.

After he resigned, Miletak sent an e-mail to Dan Smith, a senior manager at Royal Coach, requesting compensation for the time he believed he would have been working for the company. In that e-mail, he said Paganelli interviewed him for a job as a "coach operator" and had offered him that position. At trial, Miletak testified that when he wrote the e-mail, he still believed the company had offered him a job as a commercial bus driver. But he also said that was no longer his belief; he testified that he now believes he was hired for the training position at $10.30 per hour, and understands he was not offered $50,000 per year. Although Miletak claimed he responded to the ad for commercial bus

drivers, he admitted he knew when he applied that he was not qualified to be a commercial bus driver because he did not have a commercial driver's license.

Miletak never submitted any timesheets to Royal Coach; he thought the training logs he signed when he came into the office were his timesheets. After he resigned, Royal Coach paid him $113.30 for the 11 hours he spent training before the classroom instruction started. On April 22, Royal Coach sent him a notice of change in relationship, confirming that he had been enrolled as a commercial driver's license student from April 1 until April 20. At trial, Miletak asserted that he should have been paid for eight hours per day during that period, based on his conversation with Paganelli on March 30. He argued, alternatively, that based on the training notification notice he signed on April 1, he should have been paid for at least 4 hours each day, since the notice said that once the classroom instruction began, he would be required to attend a minimum of 4 hours a day.

Smith did not respond to his e-mail, so Miletak spoke to Sandy Allen, the president of the company. After she refused to accede to his demand for payment, Miletak filed four employment-related claims, including: (1) a claim with the Equal Employment Opportunity Commission (EEOC) alleging race and age discrimination; (2) a claim for unpaid wages with the Labor Commissioner; (3) an unemployment insurance claim; and (4) this civil action. Miletak testified that he never complained to anyone at Royal Coach about age or race discrimination. Due to staff shortages, the EEOC had not reviewed his claim before the civil action went to trial. In his claim before the Labor Commissioner, Miletak claimed unpaid wages for the period March 31 to April 20 based on 120 hours at $20.83 per hour, which was the hourly rate he would have earned working for Volt.[3] The Labor Commissioner found no violation; concluded that

[3] In his wage claim before the Labor Commissioner, Miletak claimed $2,499.60 (120 hours times $20.83 per hour), less $180 Royal Coach paid him, for a total of $2,319.60. At trial, he testified that Royal Coach paid him $113.30. Nothing in the record explains the discrepancy in Miletak's claims regarding the amount paid.

Miletak was pursuing wages he had not earned; held that Miletak was timely paid for the hours he actually worked; and dismissed the case. Miletak's unemployment claim was also dismissed. At trial, Miletak requested damages from Royal Coach from April 2015 until August or September 2015, at which time he was hired by another employer.

II. PROCEDURAL HISTORY

On April 29, Miletak filed a complaint in the superior court against Royal Coach alleging causes of action for intentional misrepresentation, breach of contract, promissory estoppel, constructive discharge, and a Labor Code violation.[4] It appears from the partial clerk's transcript that Miletak has at all times been self-represented. Royal Coach responded with a demurrer. After the trial court sustained the demurrer in part, with leave to amend, Miletak filed a first amended complaint that contained only two causes of action: promissory estoppel and constructive discharge. Royal Coach answered the first amended complaint.[5]

Before trial, Royal Coach filed a motion to compel Miletak's answers to form and special interrogatories with a request for sanctions. The trial court granted the motion and awarded Royal Coach monetary sanctions.[6]

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[4] Miletak alleged Royal Coach violated Labor Code section 2810.5, which provides that at the time of hire, the employer must give the employee written notice of certain employment-related facts that are listed in the statute. Miletak subsequently dropped that cause of action.

[5] None of these pleadings are in the clerk's transcript. These facts are based on the register of actions in the clerk's transcript and undisputed procedural facts in the parties' briefs.

[6] The record does not contain copies of the papers in support of and in opposition to the motion to compel or the court's order on the motion. According to the register of actions, the court imposed $1,490 in discovery sanctions on Miletak; according to Miletak's opening brief, the court ordered him to pay $500 in sanctions. This discrepancy in the amount sanctions imposed is of no consequence, since the amount of the sanctions is not relevant to the issues presented on appeal.

The case went to a non-jury trial before the Honorable Drew Takaichi. At the beginning of the trial, Judge Takaichi disclosed that the attorney for Royal Coach, Nancy Battel, represented his sister in an unrelated matter "some time ago"; that he first learned of that representation in early 2016; that he did not refer his sister to Battel; that he had very limited knowledge of that action; and that it was clear to him "that it did not create any sort of conflict." Miletak did not object to having Judge Takaichi preside over the trial. The court then proceeded with the trial.

At the end of Miletak's opening statement, Royal Coach made a motion for non-suit as to both the promissory estoppel and constructive termination claims. After reviewing Royal Coach's moving papers, the court allowed Miletak to make an additional opening statement to address the issues raised by the motion. At the conclusion of Miletak's supplemental opening statement, the Court granted the motion for nonsuit as to the cause of action for constructive termination and ordered that claim dismissed. The court found, however, that Miletak had made a prima facie showing regarding his promissory estoppel claim in his opening statement and denied the motion as to that claim.

Miletak began his case in chief by calling two witnesses: Paganelli and Reed. But neither witness was at the courthouse because Miletak failed to subpoena them for the trial. Miletak next attempted to enter the transcript of his deposition testimony into evidence. Royal Coach would not stipulate to using the transcript of Miletak's deposition in lieu of his live testimony. The trial court explained to Miletak that it would be unusual to proceed by deposition since he was present in court and asked him if he was prepared to testify on his own behalf. Miletak next asked for a continuance to subpoena his witnesses properly. Royal Coach objected on the ground that it had expended "great financial resources" to prepare for trial. Because Miletak had not subpoenaed the witnesses, the trial court denied his request for a continuance.

Miletak then decided to testify in his own behalf, and the trial court explained procedurally how he should go about presenting his evidence. Miletak testified in the form of an offer of proof and presented documentary evidence consisting of 11 exhibits. He was cross-examined by Battel and he testified on redirect. After Miletak rested, the court admitted the 22 exhibits Battel had used to cross-examine him into evidence. Royal Coach then renewed its motion for non-suit on the promissory estoppel claim. The court treated the motion as a section 631.8 motion for judgment, which applies in non-jury trials.

After hearing argument from both sides and reviewing the exhibits, the trial court granted the motion. The court found that Royal Coach had not made a clear, unambiguous promise to hire Miletak full time as a commercial driver earning $50,000 per year as he claimed. Instead, the evidence supported the conclusion that Royal Coach hired Miletak as a driver trainee, earning $10.20 per hour[7] with a promise to work at most 20 hours per week. The court found that although Miletak quit a job, that action was not caused by any promise or inducement by Royal Coach. The court found that enforcing the promise "as perceived by [Miletak] is the same thing as enforcing a promise that was not made," which would be an "injustice in and of itself." Thus, the court held that Miletak had failed to establish the elements of promissory estoppel by a preponderance of the evidence, granted the motion for judgment, and dismissed the action with prejudice. Miletak timely appealed.

[7] As noted previously, Miletak testified that the hourly rate was $10.30 per hour. The $113.30 Royal Coach paid was based on that rate. Nothing in the record explains the 10 cent discrepancy between the evidence and the trial court's finding and it is not at issue on appeal.

III. DISCUSSION

A. Presumption of Correctness and Adequacy of Record to Permit Review

We begin by noting that the record on appeal is incomplete. The record consists of a reporter's transcript of the one-day trial and a very limited clerk's transcript. The clerk's transcript consists of the trial court's register of actions, the judgment of dismissal, the notice of entry of judgment, the notice of appeal, and notices regarding preparation of the record on appeal. We do not have any of the pleadings, the papers in support of and in opposition to Royal Coach's motion to compel, the trial briefs, any other trial documents, or the exhibits used at trial.

One of the most fundamental rules of appellate procedure is that an appealed order is presumed to be correct. " 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956 (*Cahill*).) As the appellant, Miletak has the burden of overcoming the presumption of correctness. (*Cahill*, at p. 956; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1285 (*Maria P*.); *Oliveira v. Kiesler* (2012) 206 Cal.App.4th 1349, 1362 (*Oliveira*).) That burden includes presenting an adequate record that demonstrates the alleged error. (*Maria P*., at p. 1285; *Oliveira*, at p. 1362.) Failure to provide an adequate record on an issue requires the issue be resolved against the appellant. (*Maria P*., at p. 1285; *Oliveira*, at p. 1362 [judgment must be affirmed where appellant fails to present adequate record for review]; *Foust v. San Jose Construction Co. Inc*. (2011) 198 Cal.App.4th 181, 187.) In the balance of this opinion, we shall describe the ways in which the limited record has affected our review of the issues presented.

B. Trial Judge's Failure to Recuse Himself Based on Conflict of Interest

Miletak contends that the trial judge erred by failing to recuse himself after disclosing "a potential conflict of interest" with Royal Coach's counsel, Nancy Battel.

He contends that regardless of whether there was any actual bias, there was an *appearance* of bias or partiality that required Judge Takaichi to recuse himself after disclosing that Battel had represented his sister in an unrelated matter.

As noted, at the start of the trial, Judge Takaichi disclosed that Battel had represented his sister in an unrelated matter "some time ago"; he first learned of that representation in early 2016; he did not refer his sister to Battel; he had very limited knowledge of that lawsuit; and it was clear to him "that it did not create any sort of conflict." Miletak did not object to having Judge Takaichi preside over the trial after he made this disclosure.

Royal Coach responds that the grounds for disqualification are set forth in section 170.1 and that Miletak does not cite any of these grounds as a basis for disqualifying Judge Takaichi; that under standards applicable to federal judges, it was up to the judge to decide whether to recuse himself; and that Judge Takaichi correctly determined that he was not disqualified from hearing the case.

We begin by examining whether Miletak has preserved this claim for appeal. A challenge to a trial court judge on the ground that the judge is disqualified may be made by filing a written statement under section 170.3, subdivision (c), by peremptory challenge under section 170.6, or by making an objection on the record (*In re Christian J.* (1984) 155 Cal.App.3d 276, 280-281). "[T]he right to urge the disqualification of a judge for most causes under section 170[.1] and peremptorily under section 170.6 may be waived by the parties. [Citations.] Consequently, the actions of a disqualified judge are not void in any fundamental sense but at most voidable if properly raised by an interested party." (*Ibid.*) The California Supreme Court has stated the following rationale for applying a waiver or forfeiture[8] rule: " 'It would seem . . . intolerable to permit a party to

[8] After *In re Christian J.* was decided, the Supreme Court observed that, technically, the correct legal term for describing the loss of a legal right to challenge a

play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.' " (*Caminetti v. Pac. Mutual L. Ins. Co*. (1943) 22 Cal.2d 386, 392.)

As in *In re Christian J*., the parties here proceeded to litigate the merits of Miletak's claim after Judge Takaichi made his disclosure, during which time Miletak never protested the judge's continuing jurisdiction. "A simple, timely objection on the record would have sufficed" to preserve the issue for appeal. (*In re Christian J.*, *supra*, 155 Cal.App.3d at pp. 280-281.) By failing to object and acquiescing in the exercise of jurisdiction by Judge Takaichi, Miletak forfeited his right to appeal the question whether the judge was disqualified based on his disclosure. (*Id.* at pp. 278, 279; see also *Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 409 ["Peremptory challenges do not implicate the court's fundamental jurisdiction and may be waived by litigants who permit the proceedings to go forward without objection"].)

Even if this claim had not been forfeited, we would find no error. Miletak does not cite any of the grounds for disqualification in section 170.1. Instead, he cites federal case law and argues that Judge Takaichi should have recused himself based on an appearance of bias. But section 170.1, provides in part that a "judge shall be disqualified if . . . [¶][¶] [f]or any reason [¶][¶] [a] person aware of the facts might reasonably entertain a doubt that the judge would be impartial." (§ 170.1, subd. (a)(6)(A)(iii), hereafter section 170.1(a)(6)(A)(iii).) Since Miletak relies on an analogous standard in

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ruling on appeal based on the failure to object in the trial court is "forfeiture" and not "waiver." "[A] person who fails to preserve a claim forfeits that claim," whereas "waiver is the intentional relinquishment or abandonment of a known right." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2, internal quotes omitted.) Since older cases use the term "waiver," we will use that term when quoting older authority and the term "forfeiture" when not quoting case law.

federal case law, we will review this matter under the rules applicable to section 170.1(a)(6)(A)(iii) challenges.

"A determination on a challenge for cause under section 170.1(a)(6)(A)(iii) 'touches upon the core of the judicial process' requiring 'the appearance of objectivity of the decision maker.' [Citation.] A party moving for disqualification need not show actual bias because the Legislature sought to guarantee not only fairness to individual litigants, but also ' "to ensure public confidence in the judiciary" ' [citation], which ' " 'may be irreparably harmed if a case is allowed to proceed before a judge who *appears* to be tainted' " ' [citation]. A party has the right to an objective decision maker and to a decision maker who appears to be fair and impartial." (*Wechsler v. Superior Court* (2014) 224 Cal.App.4th 384, 390 (*Wechsler*).)

Impartiality under section 170.1(a)(6)(A)(iii) "entails the 'absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind.' " (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 389 (*Haworth*).) "The applicable disqualification standard is an objective one: if a fully informed, reasonable member of the public would fairly entertain doubts that the judge is impartial, the judge should be disqualified. [Citation.] [¶] ' "The 'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.' " [Citation.] "[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the *disinterested objective observer* whose doubts concerning the judge's impartiality provide the governing standard." ' (*Haworth, supra,* 50 Cal.4th at p. 389; [citation].) Moreover, the reasonable person must be viewed from the perspective of the reasonable layperson, 'someone outside the judicial system,' because 'judicial insiders, "accustomed to the process of dispassionate decision making and keenly aware of their Constitutional and ethical obligations to decide matters solely

on the merits, may regard asserted conflicts to be more innocuous than an outsider would." ' [Citations.]" (*Wechsler, supra*, 224 Cal.App.4th at pp. 390-391.)

"The California Supreme Court has cautioned that a party raising the issue has a heavy burden and must ' "clearly" ' establish the appearance of bias. [Citations.] '[T]he appearance-of-partiality "standard 'must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.' " ' [Citation.] 'A judge . . . "has a duty to decide any proceeding in which he or she is not disqualified." [Citation.] " 'Judicial responsibility does not require shrinking every time an advocate asserts [that] the objective and fair judge *appears* to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.' " ' [Citation.]" (*Wechsler, supra*, 224 Cal.App.4th at p. 391.) When the relevant facts are undisputed, we apply the de novo standard of review to a challenge based on a claimed appearance of partiality under section 170.1(a)(6)(A)(iii). (*Id.* at pp. 391-392.)

Wechsler is instructive. In *Wechsler*, a marriage dissolution action, the husband sought to disqualify (§ 170.3) a court commissioner who had agreed to officiate at the wedding of the wife's counsel while post-judgment support matters were pending before the commissioner. (*Wechsler, supra*, 224 Cal.App.4th at pp. 387-388.) The trial court denied the motion and the appellate court affirmed. The court held that when a judge has no social or personal relationship with an attorney and the judge's only role at the wedding was that of an officiant, disclosure was required under the California Code of Judicial Ethics, but disqualification was not mandated absent additional facts. (*Id.* at pp. 387, 395-396.) In *Wechsler*, there was no evidence the commissioner had a close personal relationship with the attorney who was getting married, participated in pre-wedding planning events, would attend the wedding reception or other social functions

surrounding the wedding other than the ceremony, or had accepted any monetary or other gifts in exchange for performing the wedding. (*Id.* at p. 396.)

The circumstances here show an even more attenuated connection between Judge Takaichi and Battel. Battel had represented Judge Takaichi's sister in an unrelated matter "some time ago." Judge Takaichi was not aware of the representation before Battel disclosed it to him when she appeared in another matter in early 2016. The judge knew very little about his sister's lawsuit and did not refer his sister to Battel. There was no evidence the judge had a social or personal relationship with Battel or even that his sister had a social relationship with Battel. There was no evidence Judge Takaichi benefited in any way when Battel represented his sister. We conclude a layperson, a fully informed reasonable member of the public, would not reasonably entertain a doubt that Judge Takaichi would be impartial. While it was prudent for Judge Takaichi to disclose the fact that Battel had represented his sister, nothing here required his disqualification.

In summary, we hold that Miletak has forfeited this claim by failing to object in the trial court. And even if he had preserved the issue for review on appeal, Judge Takaichi's disclosure did not disqualify him from hearing the trial or require that he recuse himself.

C. Denial of Miletak's Request for Evidentiary Sanctions

1. Background

This case was set for trial starting Monday, April 18, 2016. On Friday, April 15, 2016 (the last court day before trial), both parties filed their trial briefs and exhibit lists. In addition, Miletak filed two motions in limine, and Royal Coach filed a deposition list and a request for judicial notice. (We shall hereafter refer to these documents as the parties' "trial documents.") None of the trial documents are in the record on appeal.

At the beginning of trial, Miletak filed another motion in limine to impose monetary and evidentiary sanctions on Royal Coach for its alleged failure to comply with

local civil rule 9.D., which required that trial briefs, exhibits lists, and other enumerated trial documents "be lodged in the department of the trial judge . . . and served on all other parties by noon on the last court day before the date set for trial." (Super. Ct. Santa Clara County, Local Civil Rules, rule 9.D, hereafter "local rule 9D".) Battel told Judge Takaichi that his courtroom was closed when her staff arrived to lodge Royal Coach's trial documents, so she arranged for the documents to be both lodged in the clerk's office and e-mailed to the judge's courtroom clerk. At that time, Royal Coach's trial documents "were also e-mailed and mailed to Mr. Miletak as has been the custom and practice since he's been involved in this case." Battel gave the court a copy of her proof of service and a string of e-mails, which demonstrated service on Miletak via e-mail and regular mail on Friday. (Since the proof of service and e-mails are not in the record on appeal, we presume, in support of the judgment, that all of this was done before the noon deadline.) In one of the e-mails, Miletak acknowledged that Royal Coach's trial documents were delivered to his home by the postal service on Saturday. Battel also told the court that she contacted Miletak on Friday afternoon because she had not yet received his trial documents. She "finally heard from him" on Saturday. He told her he dropped his trial documents off at her Los Gatos office, which according to Battel is "not where things are to be served," so she arranged for them to be forwarded to the office she had designated for service. Although Miletak's trial documents were not served at the agreed-upon address, Battel received them and was able to respond to them.

Miletak told the court that he had only agreed to service via e-mail for one document during discovery and argued that since he had not consented to e-mail service for any other documents, service of Royal Coach's trial documents via e-mail was improper. He admitted that he received the trial documents via e-mail on Friday and his e-mail confirmed that he received them by mail on Saturday. The court found that Royal

Coach substantially complied with local rule 9D and denied Miletak's requests to exclude the documents and for monetary sanctions.

2. Standard of Review

We review the question whether sanctions should be assessed for improper litigation conduct under the deferential abuse of discretion standard of review. (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 51 [terminating sanction for pervasive misconduct]; *Ellerbee v. County of Los Angeles* (2010) 187 Cal.App.4th 1206, 1217 (*Ellerbee*).) In deciding whether the trial court abused its discretion, we "view the entire record in the light most favorable to the court's ruling, and draw all reasonable inferences in support of it. [Citation.] We also defer to the trial court's credibility determinations. [Citation.] The trial court's decision will be reversed only 'for manifest abuse exceeding the bounds of reason.' [Citation.]" (*Stephen Slesinger, Inc. v. Walt Disney Co*. (2007) 155 Cal.App.4th 736, 765 (*Slesinger*).)

Often, when the trial court imposes monetary or evidentiary sanctions, the sanctions order is authorized by statute or a rule of court. (See e.g. *Ellerbee*, *supra*, 187 Cal.App.4th at p. 1217 [sanctions under § 575.2, subd. (a) for local rules violation]; *Guillemin v. Stein* (2002) 104 Cal.App.4th 156, 167 [§ 128.7 sanctions for filing papers that are frivolous or interposed for an improper purpose]; *Diepenbrock v. Brown* (2012) 208 Cal.App.4th 743, 747 [§ 2025.420, subd. (h) sanctions for opposing motion for protective order without substantial justification].) "California . . . courts [also] possess . . . inherent power to issue a terminating sanction for pervasive misconduct." (*Slesinger*, *supra*, 155 Cal.App.4th at p. 765.) Since Miletak's motion in limine to sanction Royal Coach for allegedly violating local rule 9.D. is not in the record, we do not know what the legal basis was for his sanctions request. And his brief on appeal does not cite any legal authority for imposing sanctions in this case.

3. Analysis

Miletak argues "[i]t is abundantly clear that [Royal Coach] did not comply with the local rule 9D and that there was not substantial compliance as the court stated" since Battel admitted that service occurred on Saturday, "one full day after the requirement." He argues that the court's order declining to impose sanctions on Royal Coach was inconsistent with its prior order imposing discovery sanctions on him and complains that he was being held to a higher standard than Royal Coach's counsel. He asserts it was "inappropriate and perverse" for the trial court "to hold a self-represented litigant . . . to a higher standard than that of a practicing attorney." He contends that he was prejudiced by the one-day delay in receiving the documents because it gave him one less day to prepare for trial.

Royal Coach responds that the issues of discovery sanctions and sanctions for failure to comply with local rule 9D were "totally unrelated" and decided by two different judicial officers (the law and motion judge, Judge Joseph Huber, and the trial judge, Judge Takaichi) "based upon entirely different facts and the application of different legal criteria." We find this argument persuasive. And since the record on appeal does not include (1) the papers in support of or in opposition to the motion to compel, (2) the court's order on the motion to compel, (3) a reporter's transcript of the hearing on the motion to compel, or (4) the motion in limine to impose sanctions on Royal Coach for its alleged violation of local rule 9D, we conclude that Miletak has not presented an adequate record to overcome the presumption of correctness and to demonstrate that the court treated the parties unequally or abused its discretion when it denied his motion for sanctions. (*Maria P.*, *supra*, 43 Cal.3d at p. 1285.)

Royal Coach also contends that Miletak has failed to show an abuse of discretion since there is substantial evidence that supports the trial court's finding of substantial compliance with local rule 9D. According to the reporter's transcript, Royal Coach's

evidence included copies of Battel's proof of service and e-mails that demonstrated that Miletak actually received the documents via e-mail on Friday and regular mail on Saturday. Miletak also admitted at trial that he received the documents on Friday. This was sufficient to support the trial court's finding of substantial compliance.

As for the assertion that the trial court did not treat the parties equally when ruling on the motion for sanctions, the record shows that both parties may have committed minor errors when serving their trial documents. Royal Coach served Miletak via e-mail when he may not have consented to e-mail service. Miletak served Royal Coach's counsel at the wrong address. In our view the trial court treated the parties equally when it excused both infractions.

Finally, although Miletak may not have consented to being served with the trial documents via e-mail, since he admitted he received the documents via e-mail on Friday, April 15, there is no merit to his claim that he was prejudiced in his trial preparation by the alleged delay. If anyone was prejudiced, it was Royal Coach, who did not receive Miletak's trial documents until the Saturday before trial. But Royal Coach waived that claim at trial.

For these reasons, we conclude the trial court did not abuse its discretion when it denied Miletak's request for sanctions.

D. Denial of Miletak's Request for a Continuance

Miletak contends that the trial court's denial of his request for a continuance to subpoena Paganelli and Reed to testify at trial was reversible error.

We review the trial court's ruling denying a continuance for an abuse of discretion. (*Thurman v. Bayshore Transit Management, Inc*. (2012) 203 Cal.App.4th 1112, 1126 (*Thurman*).) " 'The decision to grant or deny a continuance is committed to the sound discretion of the trial court. [Citation.] The trial court's exercise of that discretion will be upheld if it is based on a reasoned judgment and complies with legal

principles and policies appropriate to the case before the court. [Citation.] A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse thereof appearing in the record.' [Citation.]" (*Thurman*, at p. 1126.)

Rule 3.1332 sets forth standards and factors for trial courts to consider in ruling on motions for trial continuances. It provides: "To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm. All parties and their counsel must regard the date set for trial as certain." (Rule 3.1332(a).) "Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance." (Rule 3.1332(c).) "Circumstances that may indicate good cause include," among other things, the "unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances." (Rule 3.1332(c)(1).) In ruling on a request for a continuance "the court must consider all the facts and circumstances that are relevant to the determination." (Rule 3.1332(d).) Among other things, the trial court properly considers the "proximity of the trial date," the "length of the continuance requested," the "availability of alternative means to address the problem that gave rise to the [request] for a continuance, the "prejudice that parties or witnesses will suffer as a result of the continuance," whether "all parties have stipulated to a continuance," and whether the interests of justice are best served by a continuance or by the trial of the matter. (Rule 3.1332(d)(1), (3)-(5), (9)-(10).)

The lay witnesses Miletak wanted to call were not unavailable because of death, illness, or other excusable circumstance. (Rule 3.1332(c)(1).) In fact, there was no showing of unavailability. The witnesses did not appear because Miletak failed to subpoena them for trial. In addition, there was no evidence the witnesses failed to appear because of any action by Royal Coach. In denying the request for a continuance, the trial court stated, "Parties are both charged with the responsibility of securing attendance of

their respective witnesses and by court subpoena. That is the method in which a party can assure that either the witness will appear or that a request for continuance—because the subpoenaed witness didn't appear[—]would be . . . more favorably considered by the court." Since the witnesses' failure to appear was due entirely to inadequate trial preparation by Miletak, he did not demonstrate good cause for a continuance. (See *Dailey v. Sears, Roebuck & Co*. (2013) 214 Cal.App.4th 974, 1004-1005 (*Dailey*) [trial court did not abuse its discretion when it denied motion to continue hearing to conduct additional discovery where the appellant had sufficient time to conduct a reasonable investigation and his inability to complete the requested depositions was a result of his own scheduling issues and tactical choices.])

Other factors support the trial court's ruling. The trial had already started when Miletak requested a continuance, he did not specify a particular length of time for the continuance, Royal Coach objected and did not stipulate to a continuance, Royal Coach's president had taken time away from work to attend the trial, and Royal Coach claimed it would be prejudiced because it had expended "great financial resources" preparing for trial. Moreover, both in the trial court and on appeal, Miletak has failed to explain how the absence of testimony by Paganelli and Reed prejudiced him at trial or why their testimony was necessary to establish his case. (See *Dailey*, *supra*, 214 Cal.App.4th at pp. 1004-1005 [appellate court affirmed order denying continuance where appellant failed to explain why inability to depose witnesses prejudiced him or was essential to his motion].) The court noted that there was an alternative means of getting the same evidence before the court and encouraged Miletak to testify on his own behalf. Miletak then testified regarding his interactions with both Paganelli and Reed. Since Miletak was the only witness at trial, there was no contrary evidence, other than that contained in the exhibits or developed on cross-examination. For these reasons, we conclude the trial court's order denying the continuance was based on a reasoned judgment and complies

with legal principles and policies governing continuances. The trial court did not abuse its discretion when it denied Miletak's request for a continuance.

Miletak relies on *Taylor v. Bell* (1971) 21 Cal.App.3d 1002 (*Taylor*). In that case, the trial court continued the trial twice because the defendant changed attorneys shortly before trial. On May 20, 1969, the defendant substituted herself in place of her second attorney and a bench trial commenced. "The court, being of the opinion that defendant should be given full opportunity to produce all available witnesses and evidence she could muster to prove" her affirmative defense, "informed her of her right to subpoena witnesses and inquired how much time she would need." (*Id*. at p. 1005.) The defendant asked for three weeks, and the court continued the trial to June 6, 1969. The defendant subpoenaed 18 witnesses, 17 of which appeared and testified on June 6, 1969. As for the witness who did not appear, Lloyd Taylor, the court offered to continue the case if his testimony was vital to the defendant's case and sought to ascertain the substance and materiality of the testimony she expected to elicit from him, "but she answered only in terms of irrelevant generalities." (*Id.* at pp. 1005-1006.) The court denied the request for a continuance, and the case was argued and submitted. Six days later, on its own motion, the court vacated submission to enable the defendant to put on the testimony of Lloyd Taylor. The trial was continued to July 18 and then to August 28 because Taylor was unavailable on July 18. On August 28, 1969, Taylor and two additional witnesses testified, and the case was reargued and submitted for decision. The court noted that Taylor's testimony added nothing material to the defendant's case. (*Id.* at pp. 1006-1007.) After the court entered judgment for the plaintiff, the defendant appealed and made various arguments regarding the continuances. The appellate court rejected her claims, noting that the July 18 continuance was granted to accommodate the defendant and her witness, not the plaintiff. (*Id.* at p. 1007.) The court also held that any error with

regard to the continuance was procedural and did not result in a miscarriage of justice. (*Id.* at p. 1009.)

Miletak argues that *Taylor* supports the conclusion that the trial court erred when it denied his request for a continuance. He states that the court in *Taylor* "noted with apparent approval the trial court's advising the self-represented litigant of her right to subpoena witnesses." The trial court in *Taylor* did exercise its discretion to grant a continuance on the first day of trial to permit the defendant to subpoena witnesses. But that ruling was simply part of the procedural history of the case and was not at issue in the appeal. The language used in any opinion is to be understood in " ' "light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered." ' " (*Palmer v. GTE California, Inc.* (2003) 30 Cal.4th 1265, 1278.) Nothing in *Taylor* required the trial court to grant a continuance to permit Miletak to subpoena witnesses that he should have subpoenaed before trial. As for the continuance that *was* at issue in *Taylor*, by that time, the defendant had subpoenaed Taylor and the issues on appeal related to the propriety of a further continuance after Taylor failed to comply with her subpoena. Since Miletak did not subpoena his witnesses, this case is factually distinguishable. For these reasons, we hold Miletak's reliance on *Taylor* is misplaced. Nothing in *Taylor* alters our conclusion that the court did not abuse its discretion when it denied Miletak's request for a continuance.

E. Failure to Ask Clarifying Questions to Help Miletak Present his Case

Miletak contends the trial court erred when it failed "to ascertain the merits of [his] case by asking clarifying questions." He argues that since he was self-represented, that trial court had a duty to assist him and ensure that he adequately presented his case. He contends that the judgment for Royal Coach "was clearly reached by inadvertence" and that his inadvertence could have been cured by clarifying questions from the trial court.

As the court stated in *Taylor*, "While it is the duty of a trial judge presiding over the trial of a case being conducted by a [self-represented litigant] to see that a miscarriage of justice does not occur through inadvertence, [the judge] is not required to act as counsel for that party in the presentation of evidence." (*Taylor, supra,* 21 Cal.App.3d at p. 1008.)

Miletak relies on *Lombardi v. Citizens National Trust and Savings Bank* (1955) 137 Cal.App.2d 206 (*Lombardi*). The plaintiff in *Lombardi* sued the executor of the estate of Minnie Hutchin claiming that Hutchin owed him $25,000 based on a promise in a letter. The defendant denied that Hutchin had signed the letter and claimed her signature was obtained by fraud. (*Id.* at p. 207.) The plaintiff was self-represented at trial. When he attempted to offer the report of a forensic document examiner and three exemplar signatures that allegedly belonged to Hutchin, the defendant objected on the grounds of hearsay and lack of foundation. After the trial court sustained the objections, the plaintiff said he did not know how to lay a foundation for the signatures. The trial court responded, "I can't tell you. I am trying the case, I am not an attorney to advise you," and "I cannot help you on that." The court then granted the defendant's motion for nonsuit based on a failure of proof. (*Id.* at pp. 207-208.) On appeal, the plaintiff argued that "the trial judge failed to lend him any assistance in the presentation of his evidence and as a consequence he was unable to get his evidence before the court." (*Id.* at p. 208.) The appellate court found no reversible error and affirmed the judgment. The court explained: "A litigant has a right to act as his own attorney [citation] 'but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded.' [Citations.] . . . 'A layman with resources who insists upon exercising the privilege of representing himself must expect and receive the same treatment as if represented by an attorney—no different, no better, no worse.' . . . The fact that a layman elects to

represent himself 'certainly does not excuse him from a failure of proof' of his cause of action. [Citation.]" (*Lombardi*, at pp. 208-209.) In response to the plaintiff's argument that "the judge knew he was a layman unlearned in legal procedure and the technical rules of evidence, [and] should have helped him out," the court said, "[t]hat would have been an unjust reward for ignorance . . . ." (*Id.* at p. 209.)

The *Lombardi* court stated, "It is the duty of a trial judge to see that a cause is not defeated by 'mere inadvertence' [citation] or by 'want of attention' [citation] and 'to call attention to omissions in the evidence or defects in the pleadings' which are likely to result in a decision other than on the merits [citation] and 'within reasonable limits' by proper questions 'to clearly bring out the facts so that the important functions of his office may be fairly and justly performed' [citation]. [The judge] is not, however, required to act as counsel for a litigant in the presentation of his evidence." (*Lombardi*, *supra*, 137 Cal.App.2d at p. 209.) The appellate court noted that the rules of evidence that applied in *Lombardi* were "somewhat technical" and that even attorneys have difficulty "properly presenting competent evidence to prove" the type of claim at issue. The court held that explaining the applicable statute and the case law to a layperson "would undoubtedly prove abortive and a waste of time" and "might well take from the proceeding the appearance of objectivity and impartiality which are so important to public confidence in the administration of justice. This is not a case where a few suggestions on the part of the trial judge would have solved [the] plaintiff's difficulty." (*Id.* at p. 210.) In response to the plaintiff's assertion that he was deprived of a fair trial, the court said the plaintiff, not trial judge, was responsible for his plight. (*Ibid.*)

Miletak asserts that his trial testimony "failed to address one or two critical elements" of his promissory estoppel claim and argues that the trial court should have asked questions to make sure he addressed those elements. Miletak does not expressly state which element or elements of the cause of action his trial testimony failed to

address. Under the doctrine of promissory estoppel, a " 'promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' " (*C & K Engineering Contractors v. Amber Steel Co*. (1978) 23 Cal.3d 1, 6.) Miletak argues that if asked, he would have testified that: (1) "any offer of employment by a regular employer was sufficient, regardless of compensation, and would have caused him to resign his contract assignment with Volt," and (2) he resigned from Volt "solely because of the promise of employment with [Royal Coach]." Thus, his argument appears to be directed at the inducement element of the promissory estoppel claim.

However, in ruling on the motion for judgment, the trial court did not find that Miletak failed to address the inducement element. Instead, the court found that his testimony and the documentary evidence did not establish that any promise by Royal Coach actually induced him to quit his job at Volt. The court found that the exhibits—which are not in the record—indicated that Miletak "was free to work elsewhere during his training. And there was no requirement for him to quit any existing employment." In addition, Miletak testified that he quit his job at Volt because his work hours at Fujitsu conflicted with his anticipated training schedule at Royal Coach. We fail to see how any further questions by the trial court would have established an element that was already addressed by the testimony and exhibits.

Also, contrary to Miletak's assertions, the trial court did assist Miletak in presenting his case in accordance with the standards described in *Lombardi*. When Miletak failed to produce documents in response to Royal Coach's notice to produce at trial, the court explained the consequences of not producing them and gave him an opportunity to put the documents together and to produce them to Royal Coach at a break in the trial. When Royal Coach moved for a nonsuit after Miletak's opening statement, the court asked Miletak

if he had additional information to augment his opening statement. When Miletak said he did not, the Court explained the nature of a non-suit motion, questioned him on the elements of his promissory estoppel claim, and encouraged him to add any additional facts that he might have. After Miletak made his supplemental opening statement, the court denied the motion for nonsuit. After Royal Coach objected to the admission of Miletak's deposition transcript, the court explained that since he was present and could testify in person, it would not receive his deposition transcript in lieu of his testimony. When Miletak agreed to testify, the Court took the time to explain procedurally how he would go about presenting his evidence and prompted him with questions to get the process started. The court also guided Miletak through the process of introducing his exhibits into evidence. After Battel completed her cross-examination, the court explained the process of redirect. After the court sustained Royal Coach's objection to one of Miletak's exhibits on the ground that it lacked foundation, the court explained what that meant and asked Miletak leading question to help him establish the document's foundation.

For these reasons, we reject Miletak's claim that the trial court erred by failing to ask him clarifying questions.

IV. DISPOSITION

The judgment is affirmed.

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Greenwood, P.J.

WE CONCUR:

_____
Bamattre-Manoukian, J.

_____
Danner, J.

Miletak v. Royal Coach Tours

No. H043999